Wild Oats Markets, Inc. d/b/a Wild Oats Community Markets *and* United Food and Commercial Workers Union, Local 655, AFL–CIO, CLC. Case 14–CA–24815

September 28, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND TRUESDALE

On June 22, 1998, Administrative Law Judge David L. Evans issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.

I. FACTS

The Respondent operates a natural foods grocery store in Ladue, Missouri. The Respondent is one of several tenants in the Lammert Center, a strip mall shopping center owned by The 1861 Group, L.P. (owner), and managed by Solon Gershman, Inc., Realtors (manager). The owner and Respondent were parties to a lease agreement, pursuant to which the Respondent was granted the right to occupy and use the building in which the Respondent operates its store, as well as an "appurtenant easement" and the nonexclusive right to use all of the common areas of the Lammert Center, including the parking lot and sidewalk in front of the Respondent's store.[2] The lease agreement further provided that the common areas of the Lammert Center would be subject to the control and management of the owner.

Although the lease agreement additionally contained a "no solicitation" policy—pursuant to which lessees of the Lammert Center were to refrain from soliciting or giving "permission to others to solicit or conduct operations in any manner in any of the parking, delivery, and other Common Areas of the shopping center"—the Respondent itself did not maintain a no-solicitation/no-distribution policy. Indeed, as set forth in greater detail in the judge's decision, on numerous occasions the Respondent had permitted various charitable, as well as for-profit, organizations to set up displays and distribute literature both inside and outside the store.

On October 16, 1997,[3] several nonemployee union representatives, along with one part-time employee of the Respondent, began peacefully picketing and distributing literature[4] to customers while standing and walking in the "no parking" area in front of the Respondent's store. Shortly after the union representatives' arrival, an agent of the Respondent contacted the manager to report the presence of the picketers and to inquire about the owner's policy regarding such picketing activity in the owner's parking lot. Subsequently, an agent of the manager, George Marcher, accompanied by the Respondent's attorney, Fred Ricks, approached the union representatives and asked them to move from the parking lot in front of the Respondent's store to the perimeter of the Lammert Center, between the parking lot and the public road. The union representatives asserted that they had the right to continue their activity and, therefore, they refused to move.

Thereafter, Marcher called the Ladue Police Department to request that the police move the union representatives away from the owner's parking lot. Members of the Ladue Police Department arrived at the Lammert Center and, pursuant to Marcher's request,[5] asked the union representatives to move to the perimeter of the shopping center. After they declined to move, the police officers informed Marcher that, pursuant to the "Policy for Trespassing Complaints During Labor Disputes" distributed to local police by the county prosecutor's office, they could take no further action on Marcher's verbal

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] Regarding the physical design of the Lammert Center premises, the parties stipulated that a sidewalk runs along the front of the Respondent's store; immediately adjacent to the sidewalk in front of the store is a designated "no parking" area. Behind the "no parking" area is a driving lane, which is used by cars traveling among stores in the shopping center; both the driving lane and the "no parking" area are part of the adjacent parking lot, which is owned by the owner and used by the various tenants of the shopping center.

[3] All dates hereafter are in 1997, unless otherwise indicated.

[4] The handbills distributed by the union representatives referenced a settlement agreement—which resolved unfair labor practice charges – between the Respondent and the NLRB, and urged customers not to shop at the Respondent's store; the signs worn by the picketers read: "Wild Oats Is Unfair To Employees."

[5] Lieutenant Baldwin, one of the officers who went to the Lammert Center on October 16, testified that Ricks stated that Respondent was not making any complaint, and that Ricks did not make any requests for him, or the police department, to take any action.

complaint unless the Union did not file an unfair labor practice charge with the Board by 5 p.m. the next day.[6] Accordingly, as the Union filed unfair labor practice charges[7] the following day, the police department took no further action with respect to Marcher's oral complaint. Similarly, neither the Respondent, the owner, nor the manager took any further action with regard to the union picketers/handbillers; accordingly, the union representatives continued picketing almost daily after October 16.

II. THE JUDGE'S DECISION

The complaint in this case alleges that the Respondent violated Section 8(a)(1) of the Act in attempting to cause the removal of union representatives engaged in protected handbilling and picketing activity in the parking lot in front of the Respondent's store. The judge, citing *Food For Less*, 318 NLRB 646 (1995), enfd. in relevant part 95 F.3d 733 (8th Cir. 1996), found that the Respondent did not possess a property interest sufficient to permit it to exclude the nonemployee union representatives, as the Respondent merely had an appurtenant easement for the common areas surrounding its store, including the parking lot area in which the picketing/handbilling occurred. The judge further found that the Respondent's act of reporting the picketing/handbilling to the manager, with the objective of having the manager/owner take action to terminate the activity (i.e., to interfere with the union activity), constituted a violation of Section 8(a)(1). In so finding, the judge rejected the Respondent's contention that its communication to the manager/owner was "free speech" protected by the First Amendment and Section 8(c) of the Act. Finally, the judge determined that, even if a finding of discrimination were necessary to establish an 8(a)(1) violation on the part of the Respondent, that requirement was satisfied. In that regard, the judge—citing the monthly solicitations by charitable organizations inside the Respondent's store, together with several outdoor solicitations and displays by, inter alia, a local humane society, a circus, high school students, and several for-profit organizations—rejected the Respondent's contention that the occasions on which it previously had permitted solicitations were "isolated and beneficient."

Analysis

It is well established that an employer may properly prohibit solicitation/distribution by nonemployee union representatives on its property if reasonable efforts by the union through other available channels of communication will enable it to convey its message, and if the employer's prohibition does not discriminate against the union by permitting others to solicit/distribute. See *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992); *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956). This precedent, however, presupposes that the employer at issue possesses a property interest entitling it to exclude other individuals from that property. Therefore, in situations involving a purported conflict between the exercise of rights guaranteed by Section 7 of the Act and private property rights, an employer charged with a denial of union access to its property must meet a threshold burden of establishing that it had, at the time it expelled the union representatives, a property interest that entitled it to exclude individuals from the property. If it fails to do so, there is no actual conflict between private property rights and Section 7 rights, and the employer's actions therefore will be found violative of Section 8(a)(1) of the Act. See *Indio Grocery Outlet*, 323 NLRB 1138, 1141–1142 (1997), enfd. 187 F.3d 1080 (9th Cir. 1999), cert. denied 529 U.S. 1098 (2000); *Food For Less*, supra at 649–650; *Bristol Farms, Inc.*, 311 NLRB 437, 438–439 (1993). In determining the character of an employer's property interest, the Board examines relevant record evidence—including the language of a lease or other pertinent agreement—in conjunction with the law of the state in which the property is located. See *Food For Less*, supra, at 649.

Applying these principles to the facts of this case, we conclude that the Respondent—by initiating a chain of events that culminated in the attempted removal of nonemployee union representatives engaged in lawful, protected activity[8] from the parking area in front of the Respondent's store—interfered with the Section 7 rights of employees. The judge found, and we agree for the reasons set forth by him, that the Respondent did not pos-

[6] The referenced policy further provided, inter alia, that if the picketers who are the subject of a trespassing complaint file an unfair labor practice charge by 5 p.m. on the day following the complaint, the police should defer any action on the complaint until the NLRB makes a determination concerning the picketers' right to enter the property; alternatively, if the picketers fail to file an unfair labor practice charge, the police should treat the complaint the same as any other criminal trespassing complaint.

[7] In addition to the instant unfair labor practice charge, the Union filed a charge against the owner and the manager, alleging that they violated Sec. 8(a)(1) by causing the union representatives to be threatened with arrest for trespass for engaging in peaceful picketing activities. On January 22, 1998, the Regional Director refused to issue a complaint against the owner and manager, based on the facts that (1) the owner had a property interest in the common areas where the union representatives were picketing/handbilling; (2) the owner maintained a valid no-solicitation/no-distribution rule; (3) there was no evidence that the owner discriminatorily enforced its no-solicitation/no-distribution rule; and (4) there was no evidence that the Union lacked a reasonable alternative means of conveying its message.

[8] No party contended that the union representatives' handbilling and picketing was unlawful or unprotected under Sec. 7 of the Act.

sess a property interest that entitled it to exclude the nonemployee union representatives from the parking lot in which they were handbilling and picketing.[9] No party has excepted to the judge's finding in this regard. In light of the Respondent's lack of a sufficient property interest, it is unnecessary to engage in an analysis applying *Babcock & Wilcox* and *Lechmere* (i.e., to determine whether the union representatives had other reasonable alternative means of communication and whether the Respondent discriminatorily applied a no-solicitation policy). Accordingly, we do not pass on the Respondent's exception that the judge erred in finding that the instances of prior solicitations permitted by the Respondent at its store were not "isolated and beneficient"—such that the attempted removal of the union representatives reflected a discriminatory application of any purported no-solicitation policy of the Respondent.

Although the Respondent concedes that it did not have a property interest entitling it to exclude the union representatives, the Respondent excepts to the judge's conclusion that it violated Section 8(a)(1), arguing that the Respondent itself did not expel or attempt to expel the individuals from the property. Specifically, the Respondent asserts that, upon learning of the picketers/handbillers' presence, it merely phoned the manager to inquire about the owner's policy with respect to the performance of such activity at the shopping center; it did not call the police, or ask the manager to call the police or otherwise take any action against the picketers/handbillers. The Respondent emphasizes that Lieutenant Baldwin of the Ladue Police Department testified that the Respondent never lodged a complaint or asked the police to take any action with respect to the picketers/handbillers.

Thus, the Respondent contends and the dissent finds that the Respondent did not take any *direct* action in furtherance of the removal of the union representatives from the property or explicitly request that another party expel them.

We agree with the judge that the Respondent's actions constituted an indirect attempt to expel the union representatives and, consequently, constituted interference with employee Section 7 rights. It is undisputed that the lease agreement between the Respondent and the owner explicitly set forth the owner's policy concerning solicitation. Accordingly, given the Respondent's presumed prior knowledge of the owner's no-solicitation policy, it is highly unlikely that the purpose of the Respondent's phone call to the manager was simply to educate itself concerning such policy, as the Respondent contends. Rather, the more plausible explanation is that the Respondent anticipated that the manager/owner would take some action toward removal of the picketers/handbillers upon being alerted of their presence. Additionally, as noted by the judge, numerous acts of solicitation/distribution by various nonunion organizations previously had taken place in and around the Respondent's store, yet the Respondent had never phoned the manager to report the presence of the organizations or inquire about the owner's policy concerning such activity.[10] The record evidence fully supports the judge's finding that the "Respondent's contacting the property owner about the picketing and handbilling was an implied . . . request for the property owner to do something. That something, ineluctably, was a call to the police in an attempt to get the Union's lawful picketing and handbilling activities stopped."

It is undisputed that the Respondent's counsel accompanied the manager's representative, George Marcher, when he approached the union representatives and requested that they move to the perimeter of the shopping center and, additionally, when Marcher requested the police to remove the individuals from the property. Although the Respondent's counsel did not speak to the union representatives or police, there is no explanation for his presence on the property at the time of those events; thus, we find that the judge properly inferred that the purpose of his presence was to oversee the removal of the picketers/handbillers.

It is beyond cavil that had the Respondent directly ordered the union representatives to cease picketing and vacate the premises or, alternatively, directly requested the police to remove the union representatives, the Respondent would have engaged in unlawful interference with employee Section 7 rights. See *Indio Grocery Outlet*, supra at 1142; *Bristol Farms*, supra at 439; *Giant Food Stores*, 295 NLRB 330, 332–333 (1989). It would be anomalous, therefore, to permit the Respondent to accomplish the same objective by indirect means—to engage in conduct that has the intended and foreseeable consequence of interfering with employee Section 7 rights. Indeed, the Board in other contexts has indicated

[9] As found by the judge, the Respondent's lease agreement with the owner merely granted the Respondent an appurtenant easement and the *nonexclusive* right to use the common areas of the Lammert Center, which specifically included the parking lot and sidewalk in front of the Respondent's store. See *Food For Less*, supra, 318 NLRB at 649 (discussing the limited property interest granted to the holder of a nonexclusive easement under Missouri law).

[10] Thus, any contention by the Respondent that its phone call to the manager merely constituted the fulfillment of an implicit obligation to notify the owner of the solicitation activity on the property—by virtue of the no-solicitation provision in its lease agreement—is belied by the fact that the Respondent failed to so notify the manager/owner on any of the other numerous occasions on which such activity occurred.

its willingness to hold employers responsible for violations of the Act that are the proximate and foreseeable result of the employer's action. See generally, *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984) (holding that an employer violated Sec. 8(a)(3) when—after the union prevailed in a representation election—it sent a letter to the INS requesting that the agency check the status of several specified employees, with the proximate and foreseeable result that the employees at issue were deported or voluntarily left the country as a result of their status as undocumented aliens).[11]

For all the foregoing reasons, we find that the Respondent's phone call to the manager reflected an implicit request that the manager or owner take some action to remove the nonemployee union representatives from the property and, accordingly, constituted interference with employee Section 7 rights.

Furthermore, we find unavailing the Respondent's assertion that its communication to the manager constituted "free speech" protected both by the first amendment and Section 8(c) of the Act and, as such, cannot serve as the basis of an unfair labor practice finding. The Respondent cites no authority to support its contention. With regard to the Respondent's first amendment claim, it is axiomatic that various restrictions are placed on an individual's or employer's speech to the extent that the speech conflicts with, or infringes upon, other established rights. See, e.g., *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617–619 (1969). Within the context of the NLRA, an employer statement evidencing a "threat of retaliation based on misrepresentation and coercion [is] without the protection of the first amendment." Id. at 618. Although an employer, as with any individual, enjoys the freedom of speech guaranteed by the first amendment, the Supreme Court has made clear that

> Any assessment of the precise scope of employer expression, of course, must be made in the context of its labor relations setting. Thus, an employer's rights cannot outweigh the equal rights of the employees to associate freely,[12] as those rights are embodied in § 7 and protected by § 8(a)(1) and the proviso to § 8(c).

Id. at 617.

It is clear that had the Respondent directly asked the union representatives to leave, or called the police to request their removal, the Board would have found the Respondent in violation of Section 8(a)(1), as such employer "speech" would violate employee rights protected by the Act. Accordingly, it would be anomalous to accord the Respondent's communication of the same message greater First Amendment protection simply because the Respondent sought to accomplish indirectly that which it was prohibited from doing directly.

Section 8(c) of the Act does not afford the Respondent's communication any greater protection. Indeed, Section 8(c) was enacted primarily to emphasize that although the Act placed some limitations on employer speech, it did not completely abolish the free speech rights guaranteed by the First Amendment. See *Gissel*, supra, at 617; 1 Legis. History 429 (LMRA 1947). Specifically, the legislative history of the Taft-Hartley amendments indicates that Section 8(c) was enacted for the principal purpose of protecting employers' rights to express their *views or opinions* regarding unions and union organization to their *employees*. See 1 Legis. History 429, 959 (LMRA 1947); *NLRB v. Overnite Transportation Co.*, 938 F.2d 815, 819 (7th Cir. 1991), enfg. 296 NLRB 669 (1989). The Respondent here was neither expressing views or opinions, nor directing its message to employees; rather, the Respondent conveyed to the property manager an implicit request that the manager engage in action that would interfere with employee rights guaranteed by the Act.

Having rejected the Respondent's claim that its communication with the manager constituted "free speech" protected by the First Amendment or Section 8(c) of the Act, and having found that such communication had the foreseeable and intended consequence that the manager would take action in furtherance of the removal of the nonemployee union representatives from the property, we find that the Respondent engaged in interference with employee Section 7 rights. Accordingly, we affirm the

[11] Our dissenting colleague dismisses the *Sure-Tan* case as irrelevant, since the facts presented by that case are not identical to those in the instant case. Although *Sure-Tan* admittedly involved a different factual context, the employer's course of conduct (and resulting indirect violation of the Act) in that case is distinctly analogous to the situation here. As in this case, the Respondent in *Sure-Tan* caused a third party to take action that restrained, interfered with, or retaliated against the exercise of Sec. 7 rights (i.e., the investigation of the legal status of various employees), with the foreseeable consequence being the "constructive discharge" of the employees at issue (through the voluntary/involuntary departure of such individuals from the country and, accordingly, departure from the employer's payroll). As it would have been a violation of the Act for the employer in *Sure-Tan* to itself discharge the employees, the Board and Court found it reasonable to hold the employer responsible for its accomplishment of the same result through indirect means. As in *Sure-Tan*, the Respondent here should be held accountable for the foreseeable result of its conduct in causing a third party to interfere with Sec 7 rights through the removal of the picketers/handbillers from the property.

[12] Protection of employee freedom of association (as well as the right to self-organization) is one of the fundamental principles upon which the Act is premised. See 29 U.S.C. § 151.

judge's conclusion that the Respondent violated Section 8(a)(1) of the Act.[13]

ORDER

The National Labor Relations Board adopts the recommended order of the administrative law judge and orders that the Respondent, Wild Oats Community Markets, Ladue, Missouri, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified below.

Substitute the following notice for that of the administrative law judge.

Dated, Washington, D.C. September 28, 2001

Wilma B. Liebman, Member

John C. Truesdale, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN HURTGEN, dissenting.

Respondent is a tenant in a strip-type shopping mall. Respondent does not except to the judge's finding that the area in which the Union's activity occurred (the parking lot) was within the control of the mall owner, and was not within the control of Respondent. Thus, *Respondent* could not take steps to oust the picketer-handbillers (referred to herein as pickets) from that area.

However, Respondent did not do so. Respondent took the reasonable step of calling the owner-manager, i.e., the party which had control over the area.[1] Respondent asked the owner what the owner's policy was. The owner concluded that the policy was that the pickets should be removed. The owner then told the pickets to leave. When they refused to do so, the owner called the police, and asked that the police remove the pickets. The police ultimately decided not to remove the pickets and they therefore remained.

In these circumstances, it is clear that the Respondent simply went to the owner who had control of the property, and the owner then took the action.[2] I recognize that Respondent's agent was present when the owner requested the pickets to leave and requested the police to take action. However, there is no evidence that Respondent did or said anything during these conversations.

My colleagues say that Respondent set in motion a chain of events that led the owner to act. Concededly, but for the Respondent's phone call to the owner, the owner would not have known the facts which prompted it to act. But, this is not to say that Respondent is responsible for the owner's action. Respondent did not ask for any action. Similarly, my colleagues say that Respondent anticipated that the owner would take steps to remove the union agents. Assuming arguendo that this is so, this is not to say that Respondent is responsible for those acts.

Sure-Tan v. NLRB, 467 U.S. 883 is clearly different. In that case, the respondent called the government authorities (INS) and asked them to act. In the instant case, the Respondent did not do so. The owner did so, and there is no suggestion that this was unlawful.[3] In short, Respondent did not cause the public authorities to take action. It posed a question to the owner, and the owner contacted the public authorities.

Dated, Washington, D.C. September 28, 2001

Peter J. Hurtgen, Chairman

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice

[13] We additionally affirm the judge's finding that the Respondent—through its posted notice and oral communications with employees—did not fully remedy its unlawful conduct, such that a remedial order is unnecessary. These measures provided assurances that the employees themselves could engage in Sec. 7 activity, but not the nonemployee representatives against whom the Respondent had taken action. See *The Broyhill Co.*, 260 NLRB 1366 (1982); *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978).

[1] Since the owner-manager was the agent of the owner, I have referred to that party as the owner.

[2] The property owner had the right to take steps to oust the union representatives (see *Lechmere*, 502 U.S. 527 (1992)), and no complaint has been filed against the owner. A charge was filed against the owner and manager, and it was dismissed.

[3] See fn. 2 supra.

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT inform the owner of the Lammert Center about any lawful picketing or handbilling activities by United Food and Commercial Workers Union, Local 655, AFL–CIO, CLC, where an object of so informing the owner is to interfere with such activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WILD OATS MARKETS, INC. D/B/A WILD OATS COMMUNITY MARKETS

Lucinda L. Flynn, Esq., for the General Counsel.
Fred A. Ricks Jr., and *Daniel Begian, Esqs.*, of St. Louis, Missouri, for the Respondent.
Karl Sauber, Esq., of St. Louis, Missouri, for the Charging Party.

DECISION

STATEMENT OF THE CASE

DAVID L. EVANS, Administrative Law Judge. The hearing in this matter under the National Labor Relations Act (the Act) was conducted before me in St. Louis, Missouri, on March 17, 1998. On October 17, 1997,[1] United Food and Commercial Workers Union, Local 655, AFL–CIO, CLC (the Union) filed a charge under the Act against Wild Oats Markets, Inc., d/b/a Wild Oats Community Markets (the Respondent). On the basis of that charge, a complaint was issued by the General Counsel alleging that, in violation of Section 8(a)(1) of the Act, Respondent, on or about October 16, discriminatorily attempted to cause individuals acting in sympathy with the Union to be removed from public areas in front of Respondent's retail store in Ladue, Missouri, because those individuals were picketing and handbilling on behalf of the Union. The Respondent admits that the National Labor Relations Board (the Board) has jurisdiction of this matter, but it denies the commission of any unfair labor practices.

Upon certain stipulations and testimony and exhibits entered at trial, and upon my observations of the demeanor of the witnesses,[2] and after consideration of the briefs that have been filed, I make the following findings of fact and conclusions of law.

[1] All dates mentioned are in 1997, unless otherwise indicated.

[2] Credibility resolutions are based on the demeanor of witnesses and any other factor that I may mention.

At the hearing the parties entered into the following written stipulation.[3]

STIPULATION OF FACTS

IT IS HEREBY STIPULATED AND AGREED by and between United Food and Commercial Workers Union, Local 655, AFL–CIO, CLC, here called the Union; Wild Oats Markets, Inc. d/b/a Wild Oats Community Markets, here called Respondent; and the General Counsel of the National Labor Relations Board as follows:

I. JURISDICTION

1. Respondent is engaged in the retail sale of natural foods and related products at its place of business in Ladue, Missouri. Jurisdiction of the National Labor Relations Board, herein called the Board, has been admitted in the pleadings.

2. At all times material, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. LABOR ORGANIZATION

3. The Union is, and has been at all material times, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICE

A. Background

4. Respondent operates a natural foods grocery store in Ladue, Missouri, situated in a strip mall shopping center known as the Lammert Center, here called the Store.

5. The Lammert Center is located at the corner of Ladue Road and Gay Avenue in Ladue, Missouri. Ladue is a municipality in St. Louis County, Missouri.

6. At all material times herein, the Store's employees have not been represented by a labor organization.

7. The Lammert Center is owned by The 1861 Group, L.P.[,] here called the Owner.

8. The Lammert Center is managed for the Owner by Solon Gershman[,] Inc., Realtors, here called the Manager.

B. The Respondent's Store

1. The Physical Layout

9. The Store is one tenant of a multi-tenant strip mall known as the Lammert Center.

10. The Lammert Center is accessible to customers from a parking lot shared by the Store and other tenant stores in the Lammert Center. There is also a sidewalk immediately in front of the Respondent's Store.

11. There is an enclosed foyer at the front of the Store. Doors on either side of this foyer serve as the entrance and exit for the Store's customers.

[3] The text of this stipulation has been electronically transferred; therefore, except for bracketed insertions, all wording, capitalizations, and punctuation are original.

12. A sidewalk runs along the front of the Store, and in front of the foyer. Immediately in front of the sidewalk on both sides of the foyer is a parking lot containing a few parking spaces directly in front of the store. The first few feet of the parking lot adjacent to the sidewalk in front of the foyer is designated and marked off as a "no parking" area. A survey map of the Lammert Center is attached as Exhibit 1.

13. Behind the parking spaces directly in front of the Store and the other stores is a driving lane which is part of the parking lot, used by cars traveling to and from stores in the shopping center including Respondent's Store. The driving lane and parking lot are made of asphalt.

14. Running parallel to the shopping center, and adjacent to Ladue Road, is a public sidewalk, approximately ninety (90) feet from the front of Respondent's store.

15. Inside the Store's foyer are a public telephone, an ATM money machine, and a general bulletin board with general notices posted such as cars and homes for sale.

16. As part of the record, the parties have attached the following exhibits identified as follows: [Photographs that are the stipulations exhibits two through six are described.]

2. Respondent's Interest in the Property

17. The Lammert Center in which Respondent's store is located is owned by the Owner.

18. The parking lot in front of the Respondent's store is owned by the Owner.

19. Respondent and the Owner entered into a lease. The lease was in full force and in effect on October 16, 1997. A copy of the lease is attached as Exhibit 7 and made a part hereof.

20. Section 2.2 of the lease grants to Respondent "an appurtenant easement" for all of the common areas, including the parking lot and the sidewalk in front of the Store.

21. Section 15.1 of the lease grants to Respondent the "non-exclusive" right to use the common areas, including the parking lot and the sidewalk in front of the Store.

22. Section 15.2 of the lease provides, in pertinent part, "The Common Areas shall be subject to the control and management of the Lessor."

3. No Solicitation Policy

23. At all times material herein, the Respondent has not maintained a no-solicitation [or] distribution policy.

24. At all times material herein, the Owner had a written "No solicitation" policy in its lease with the Respondent which provided: "Lessee shall not solicit or give permission to others to solicit or conduct operations in any manner in any of the parking, delivery and other Common Areas of the shopping center, other than deliveries."

25. Since about August 1, 1996, Respondent has allowed different charitable organizations to set up displays and distribute literature inside the Ladue, Missouri, store once each month, with the charitable organizations receiving 5 percent of that days profits. These monthly charitable events are called 5% Days. A list of the date and name of the participating charity for each 5% Day is set forth below.

LIST OF 5% CHARITY EVENTS

Date	Name of Charity
8/21/96	Children's Foundation
9/18/96	Earthways
10/16/96	Animal Protective Association
11/20/96	Redevelopment Opportunities For Women
12/18/96	Places For People
1/22/97	Child Haven
2/19/97	Our Little Haven
3/19/97	Cancer Support Center
4/23/97	Circus Flora
5/07/97	Humane Society of Missouri
6/18/97	American Lung Association of Eastern Missouri
7/16/97	Youth Emergency Services
8/20/97	St. Louis Area Food Bank
9/17/97	Missouri Humanities Council
10/15/97	Family Support Network
11/12/97	Wild At Heart Foundation and Save America's Forests
12/17/97	Life Crisis Center
1/24/98	Shining Rivers

26. On two isolated occasions, two charitable groups briefly extended their activities onto the sidewalk or parking lot in front of the store on a 5% day. These two groups were Circus Flora and the Humane Society which had animals that were not allowed inside the store.

27. For part of the day on April 23, 1997, Respondent allowed Circus Flora to post a banner outside of Respondent's store announcing a performance of the Circus Flora. A picture of this Circus Flora banner is attached as Exhibit 8 and made a part hereof.

28. On April 23, 1997, the Respondent allowed several of the Circus Flora artists to perform in the parking lot in front of Respondent's store for approximately 30 minutes. Photographs of the Circus Flora artists performing in front of the Respondent's store in the "no parking" area are attached as Exhibits 9, 10, 11 and 12 and made a part hereof.

29. On April 23, 1997, Respondent allowed Circus Flora to distribute literature inside the store at a display table. A photograph of the Circus Flora display publicizing Circus Flora inside the Respondent's store is attached as Exhibit 13 and made a part hereof. A copy of the literature distributed by Circus Flora is attached as Exhibits 14, 15, and 16 and made a part hereof.

30. Respondent contacted neither the Owner nor the Manager about the presence of either the Humane Society or Circus Flora, on the parking lot in front of Respondent's Store.

31. Respondent did not contact the Owner or the Manager about the presence of charitable organizations allowed to set up displays inside the Respondent's Store once a month for the 5% Day event.

4. Events

32. On October 16, 1997, at about 11 a.m., individuals, all non-employees of Respondent except one current part time employee of Respondent, peacefully picketed and distributed literature to customers while standing and walking in the "no parking" area of the parking lot in front of the Respondent's store. A photograph of picketers who were also distributing literature in front of the Respondent's store is attached as Exhibit 17 and made a part thereof.

33. The picketers wore signs which read, "Wild Oats Is Unfair To Employees." A photograph of the signs worn by the picketers is attached as Exhibit 18 and made a part hereof.

34. The Union's picketers distributed two leaflets, one which concerned a recent settlement agreement between the Respondent and the NLRB and urged customers not to shop at Respondent's store, and the other one which provided customers with a list of alternative natural food stores where they could shop. Copies of the two handbills are attached as Exhibits 19 and 20, and are made a part hereof.

35. On October 16, 1997, at shortly after 11 a.m., an agent of Respondent contacted the Manager on behalf of Respondent to report the presence of the picketers and to inquire about the Owner's policy about such picketing activities on the Owner's parking lot.

36. On October 16, 1997, after being advised of the presence of the picketers by the Respondent, the Manager went to the Lammert Center and asked the picketers to move away from the parking lot directly in front of the Respondent's store to the perimeter of the Lammert Center, between the parking lot and Ladue Road. From the Store's foyer to the south edge of the parking lot is a distance of approximately ninety (90) feet. The Union's picketers refused the Managers request to move.

37. On October 16, 1997, after this discussion between the Manager and the handbillers, the Manager called the Ladue Police Department and requested that the police ask the picketers to move away from the parking lot and sidewalk in front of Respondent's store to the perimeter of the Lammert Center, between the parking lot and Ladue Road. The Manager also made a verbal complaint to the Police Department regarding the handbillers.

38. On October 16, 1997, at the Manager's request, a Ladue police officer asked the Union's picketers to move to the Lammert Center perimeter adjacent to Ladue Road. The picketers refused to move. Since October 16, 1997, the Ladue Police have taken no further actions concerning the Union's picketers. The Ladue Police gave the Manager[,] and had previously given the Union[,] a copy of a document entitled "Policy For Trespassing Complaints During Labor Disputes." A copy of this Policy is attached as Exhibit 21, and made a part hereof. The Ladue Police Department told the Union and the Manager that the Ladue Police Department planned to follow this written policy.

39. On October 23, 1997, the Manager, on behalf of the Owner, sent the Union a letter clarifying that only the non-employee picketers had to move to the public areas. A copy of this letter is attached as Exhibit 22 and made a part hereof.

40. Since October 16, 1997, neither the Owner, the Manager nor the Respondent have taken any further actions concerning the Union's pickets. Since October 16, 1997, the Manager has never withdrawn its complaint to the Ladue Police and has never requested that the Ladue Police take any further action concerning the Union's pickets.

41. Since October 16, 1997, the Union's picketers have picketed and distributed leaflets in front of Respondent's store almost daily.

42. On or about October 22, 1997, Respondent posted a notice to its staff members, employees, advising them that each employee has the right to participate in picketing or handbilling anywhere outside Respondent's store. This notice advised Respondent's employees that Respondent had not and will not discipline, discharge or retaliate against any Wild Oats employee for picketing or handbilling. A copy of this notice to staff members is attached, marked as Exhibit 23.

43. Since October 16, 1997, one of Respondent's part time employees has picketed periodically in the parking lot area in front of Respondent's store. Respondent has never disciplined, discharged or threatened this part time employee concerning her periodic picketing and distributing of literature for the Union. All other picketers have been non-employees of Respondent.

44. On or about October 17, 1997, the Union filed unfair labor practice charge number 14-CA24816 against the Owner and the Manager. A copy of this unfair labor practice charge is attached as Exhibit 24. By letter dated January 22, 1998, the National Labor Relations Board refused to issue a complaint against the Owner and the Manager finding the charge against the Owner and Manager to be without merit. A copy of this January 22, 1998, letter is attached marked Exhibit 25.

45. On or about February 27, 1998, the American Red Cross conducted a blood drive in front of Respondent's store in the "no parking" area for several hours. Respondent did not object to the American Red Cross conducting this blood drive in the parking lot. Photographs of the Red Cross Blood Mobile in front of the Respondent's store are attached as Exhibits 26, 27, and 28 and made a part hereof.

IT IS FURTHER STIPULATED AND AGREED that this stipulation is made without prejudice to any objection that any party may have as to the materiality or relevancy of any facts stated herein. [Signatures]

The "agent" referred to in paragraph 35 was not otherwise identified.

Ladue is a community of about 8000 people in St. Louis County. The attachment to the stipulation that is numbered "Exhibit 21" (the "Policy for Trespassing Complaints During Labor Disputes") is a publication of instructions to local police

that was issued by St. Louis Countys prosecuting attorney. At several places the publication (the County prosecutors policy) makes clear that it is to apply only to cases of alleged criminal trespass complaints that concern only peaceful activities. The County prosecutor's policy further states in relevant part:

> 4. Advise the complaining witness that the NLRB must make the final determination whether the pickets have the right to enter and remain on private property for their stated purpose. Advise the person in charge of the pickets of the identity of the person/company filing the trespassing complaint and that the union has until 5:00 p.m. of the next Federal business day following the complaint to file an unfair labor practice charge with the NLRB. . . .
>
> 5. If the pickets produce the NLRB charge, the police should defer any action on a criminal trespassing complaint until the NLRB rules on the pickets right to enter and remain on private property.
>
> 6. If the pickets fail to file the NLRB charge by the stated deadline, the police should treat the complaint as they would any other criminal trespassing complaint.
>
> 7. If the NLRB rules in favor of the pickets, the police should take no further action on a criminal trespassing complaint. If the NLRB rules against the pickets, the complaint should be treated as any other criminal trespassing complaint.

The first stipulated handbill that is being distributed by the Union states that Respondent "is not wild about obeying the law," and then it recites that Respondent had entered a settlement agreeing not to engage in certain listed unfair labor practices. Then follow a listing of benefits that the Union had "tried" to secure for Respondent's employees, an appeal to customers to shop elsewhere, and a disclaimer that there was any objective of causing any work stoppages or interference with deliveries. The handbills use of the word "tried" (past tense) was deliberate; the Union has disclaimed interest in representing any of Respondent's employees according to the testimony of the Union's representative in charge of organizing, James Dougherty. The second stipulated handbill is a listing of other stores where customers might shop instead of at Respondent's store.

According to his letter of January 22, 1998, the Regional Directors dismissal of the Union's charge against the property owner and manager was based on the facts that: (1) the property owner had an interest, as owner, in the area where the picketing and handbilling was conducted; (2) the property owner had valid no-solicitation and no-distribution rules; (3) there was no evidence that the property owner discriminatorily enforced those rules; and (4) the investigation had failed to establish that the Union "lacked a reasonable alternative means of conveying its message."

Testimony Offered by General Counsel and Charging Party

Union Representative Dougherty testified that he has been in charge of the picketing and handbilling at Respondent's store since it began on October 16. On October 15, Dougherty met with Police Lieutenant William Baldwin of the Ladue police department; at that time Dougherty told Baldwin what the Union intended to do, and he gave to Baldwin a copy of the county prosecutor's policy.

Dougherty further testified that on October 16, soon after the picketing and handbilling began, George Marcher, the manager of the Lammert Center, approached him on the sidewalk next to the store and asked that the Union move the picketing and handbilling to the perimeter of the lot. With Marcher at the time was Fred Ricks, counsel for Respondent; Dougherty did not know who Ricks was at the time. Dougherty told Marcher that he had already discussed the matter with the Union's attorney and the Ladue police, that he believed that the Union had a right to continue its activities in the area immediately in front of Respondent's store, and that the Union would continue to act as it was. At that, Marcher and Ricks turned and left, and the Union continued its picketing and handbilling as it had been doing before.[4] Dougherty further testified that Ricks said nothing during this confrontation with Marcher and that he learned Ricks name only by asking Ricks as Ricks and Marcher began to walk away from him. (Neither Ricks nor Marcher testified.)

Dougherty further testified that a police car arrived shortly after Marcher and Ricks walked away from him. Lt. Baldwin approached Dougherty and stated that the police had received a complaint about the picketing and handbilling, and Baldwin asked Dougherty when an NLRB charge would be filed. Dougherty told Baldwin that it would be filed the next day, as it was. On cross-examination, Dougherty acknowledged that the Union has not been contacted by the Ladue police since October 16. On redirect examination, Dougherty testified that the Union has never been informed that Marcher has withdrawn the complaint to which Baldwin referred.

Lt. Baldwin was called as a witness by the Charging Party. Baldwin testified that after he was informed of a call to the police department, he and one Lt. Jack Rednour went to the Lammert Center where he was met by Ricks and Marcher. Marcher told Baldwin that he represented Lammert Center and that "he did not want the picketers on the property." Baldwin testified that he told Marcher that, according to the County prosecutor's policy, he could do nothing before giving the Union until 5 p.m. the next day to file an unfair labor practice charge, unless there was blocking of ingress or egress (of which there was none). On cross-examination, Baldwin acknowledged that Ricks stated that Respondent was not making any complaint; and Baldwin further acknowledged that Ricks made no requests for him, or the police department, to do anything. Baldwin further testified that, since October 16, neither

[4] The picketing and handbilling has continued every day, with the one exception of February 27, 1998, when, as mentioned in par. 45 of the stipulation, an American Red Cross vehicle was parked in front of the store to take blood donations.

Marcher nor anyone else acting on the property Owner's behalf, nor anyone acting on Respondent's behalf, has made any further complaint or inquiry to the police department about the picketing and handbilling. On redirect examination, Baldwin testified that the police department considered Marcher's contact with the police department to be a "verbal" (oral) complaint and that no written complaint was ever filed. Baldwin testified that, other than going to the scene on October 16, the police department has taken no action on Marchers oral complaint. Baldwin fiuther testified that he has told both Marcher and Ricks that, because of the charge that has been filed, nothing could be done on the basis of the oral complaint that Marcher made on October 16. Baldwin testified that he had "no idea" what would happen to (or because of) Marchers oral complaint if the unfair labor practice charge in this matter were withdrawn or dismissed.

(Although paragraph 38 of the stipulation states that a police officer asked the picketers to move to the perimeter of the property, and that the picketers refused the police officers request, neither Baldwin nor anyone else testified that Baldwin made such a request, and I find that Baldwin did not. Baldwin, however, was accompanied to the Lammert Center by Lt. Rednour. Rednour did not testify, but apparently he was the police officer who made the request to which the parties stipulated.)

The part-time employee who, according to the stipulation, engaged in the picketing and handbilling is Barbara Hackmann. Hackmann (who is also a full-time paid organizer for the Union) testified that she was among the first picketers at the store on October 16 and that picketing has continued since that date.[5] Hackmann further testified that, shortly after she was hired by Respondent in August 1996, she witnessed two grade-school-age girls soliciting sales of tickets to "some sort of breakfast" on the sidewalk immediately outside the store.[6] Breakfast was served on the sidewalk on "four or five tables" that were set up there. The breakfast event on the sidewalk lasted for about one and one-half hours, and it could easily be seen from inside the store, as can any other activity that is conducted on the sidewalk. Hackmann further testified that in October 1996 two high-school-age girls came to the store and told her that they wanted to sell raffle tickets for their school. Hackmann thereupon paged Respondent's Marketing Director Lois Brady who was in the store at the time. After talking to Brady, the girls sold the tickets for about one and one-half hours on the sidewalk. (Brady did not testify.) Hackmann further testified that the stipulated April 23 performance of Circus Flora that was conducted in the parking lot just in front of the store included acrobats, a unicycle rider, a juggler, and the display of a tiger cub. Hackmann further testified that in September individuals representing a local radio station stayed on the sidewalk for about one and one-half hours distributing free tickets to a movie that was showing in the area. Finally on direct examination, Hackmann testified that in December a man and woman set up a table inside the store to sell sweaters that they had made; the couple remained, selling the sweaters, for about 6 or 8 hours. On cross-examination, Hackmann admitted that she was only told that the younger girls were soliciting breakfast tickets for their school, and she admitted that she did not actually know for what school (or other organization) those girls were selling breakfast tickets.

The General Counsel also introduced evidence that in December 1996 (or approximately 10 months before the picketing and handbilling here in question began) Union Representative Dougherty created a bogus petition and caused copies of it to be circulated in and outside Respondent's store. Dougherty freely acknowledged that he did this in order to test Respondent's reaction to a nonunion solicitation.[7] The petition was addressed to "Dear Federal & State Legislator," and it stated that it was being circulated in opposition to the use of growth hormones in animals and in opposition to alleged inhumane treatment of animals that were being injected with such hormones. Each copy of the animal-rights petition (as I shall call it) has spaces for the names and addresses of seven signatories, and at the bottom they state: "Please return to Greg Fister" at a stated address in St. Louis. (Fister, if he exists, was not otherwise unidentified.)

Nancy Parker is a vice president of the Charging Party, and she has never been an employee of Respondent. Parker testified that about noon on December 3, 1996, she and one Jean Underwood (also a nonemployee) took blank copies of the animal-rights petition to Respondent's store. (Underwood did not testify.) Parker testified that she and Underwood met with Tamara Ordnoff, the manager of the store. Parker asked Ordnoff if she and Underwood could walk around the store and get employees and customers to sign the petition. According to Parker, Ordnoff replied, "Yes, that'd be fine, were not too busy right now; now would be a good time." Parker and Underwood then walked the aisles of the store and collected signatures and addresses of several customers, two employees, and Marketing Director Brady who was also in the store at the time. When Parker and Underwood finished, they went to the front of the store where they again met with Ordnoff. Ordnoff asked Parker and Underwood, "How'd you do?" Parker replied that they had not done as well as they had hoped. Ordnoff asked for some copies of the petition and stated that, "I'll see what I can do." Parker gave Ordnoff three blank copies of the petition and told

[5] Specifically, the picketing and handbilling has been conducted on Mondays through Fridays from 11 a.m. to 1 p.m. and 3:30 until 7 p.m. and on Saturdays and Sundays from 11 a.m. until 3 p.m. Hackmann further testified, and it is undisputed, that never more than two picketers at a time were stationed in front of the store.

[6] Any mention of "the sidewalk" is a reference to the sidewalk immediately outside Respondent's store (as opposed to the sidewalk at the perimeter of the owner's property), unless otherwise indicated.

[7] The transcript, p. 62, L. 8, is corrected to change "dispirit" to "disparate."

her that she could mail them to the address indicated at the bottom. Ordnoff gave Parker one of her business cards (which was placed in evidence). Parker thanked Ordnoff and stated that she and Underwood wished to go out to the sidewalk and solicit the signatures of "anybody else." According to Parker "She [Ordnoff] said that would be fine because people in this area are really into this." Thereupon, further according to Parker, Parker and Underwood went to the sidewalk area where they stood for 30 minutes in positions where they could solicit more customers. Parker testified that, as she and Underwood stood outside the store, no one asked them to leave.

Dougherty testified that on December 3, 1996, he was present in Respondent's store, acting as a customer, when Parker and Underwood approached Ordnoff. At one point, Dougherty testified, he saw Parker hand Ordnoff a few copies of the animal-rights petition. Dougherty saw Parker and Underwood go outside where they solicited signatures on the petitions for about one-half hour.

Mary Guise is a business agent of the Charging Party, and she also has never been an employee of Respondent. Guise testified that about 6 p.m. on December 6, 1996, she and her sister-in-law, Valerie _____ went to Respondent's store and also met with Ordnoff. According to Guise, she asked for permission to circulate the animal-rights petition among customers and employees inside the store. Ordnoff replied that they could, "but please dont pressure any customers." After Guise and Valerie solicited signatures for about one-half hour inside the store, they returned to Ordnoff. At that point, Ordnoff presented Guise with a copy of the petition that had been signed by Ordnoff, four employees, and Lori Raseska. (In her testimony, Ordnoff described Raseska as Respondent's "front-end manager.") After accepting the petition, Guise told Ordnoff that she and Valerie wished to go outside and solicit more signatures; Ordnoff replied that that would be "fine." Guise and Valerie then went to the sidewalk where they stayed for another half-hour soliciting signatures on the animal-rights petitions. During that time, Guise further testified, no one asked them to leave. (Valerie did not testify.)

Testimony Offered by Respondent

Ordnoff testified that she was the "manager on duty" in late 1996. Ordnoff denied ever seeing Parker or Guise before the hearing, and she specifically denied granting Parker or Guise permission to circulate the animal-rights petition inside or outside the store. Ordnoff testified that in December 1996 a "young man" and two other persons came to the store. She was approached by the young man who showed her the animal-rights petition, asked her to sign it, and asked her if he could circulate the petition inside the store among customers and employees. Ordnoff told the young man that she would sign it, and she did. Ordnoff further testified that she told the young man that he could not circulate the petition in the store without the general managers permission but that she would circulate the petition among the employees herself. Ordnoff called five employees over to sign it, and they did. Ordnoff denied that the young man ever asked for permission to circulate the petition outside the store, and she denied that she ever saw anyone circulating a petition outside the store. After Ordnoff gave this testimony that she was the only one who circulated the petition among employees in the store, she was recalled for further direct examination; Ordnoff then testified that other copies of the petition were circulated at the same time by the two individuals who had come to the store with the young man. Ordnoff also then testified, referring to other copies of the petition, "And they were all circulated at that time also."

Randall Green, the general manager of Respondent's store, testified that many philanthropic and environmental organizations had attempted to solicit signatures on petitions since the store opened in August 1996. In each case, because of actual or potential customer complaints, he denied them permission in advance, or he asked the organizations to leave if they had begun to solicit without his permission. In each case the organizations complied with Green's requests. Green acknowledged that never before the Union's picketing and handbilling that began on October 16 had any agent of Respondent contacted the property owner when an organization engaged in solicitations.

In regard to the Circus Flora performance outside the store on its "5% Day" on April 23 (stipulation, pars. 25 through 31), Green testified that none of the outside activities had been preplanned, and he did not know about them until they were over.[8] In regard to the Humane Societys 5% Day of May 7 (Stipulation, pars. 25, 26, 30, and 31), Green acknowledged that the Society placed several animal cages in the parking lot in front of the store in the hope that the displayed dogs and cats would be adopted, but he denied that he had known in advance that the Society was going to do that. Green further acknowledged, however, that the Society maintained the cages in the parking lot for 30 to 40 minutes without his asking that they be removed. In regard to Hackmanns testimony that a school was once allowed to sell breakfasts on the sidewalk, Green denied that the event occurred. Green acknowledged, however, that at Respondent's "Grand Opening" in August 1996 Respondent's employees sold breakfasts on the sidewalk, the proceeds benefitting a charity.[9] In regard to the stipulated February 28, 1998 activity of the Blood Mobile, Green testified that he did not object because:

> [The] Red Cross approached us and we had gone—basically there was going to be a bus out in the parking lot, had gone through the property manager [who] okayed it. I

[8] Green was not asked about the outside banner that Circus Flora displayed on the building during its parking lot performance (stipulation, par. 27).

[9] Green was not asked about the outside banner that Circus Flora displayed on the building during its parking lot performance (stipulation, par. 27).

mean they werent soliciting much, they were just asking for donations.

Green admitted that the radio station to which Hackmann referred distributed free movie tickets to customers inside the store during its promotion, but he denied that he knew that such tickets were distributed on the sidewalk, and he denied that the representatives of the station were given permission to engage in such activity. Finally, Green flatly denied that Respondent ever permitted school children to sell raffle tickets on the sidewalk.

Green further acknowledged that inside the store, in addition to the solicitations conducted by charities on their monthly 5% Days, Respondent has "maybe a total of four times" permitted a vendor to sell sweaters, and Respondent collects a fee from that vendor.

Green further testified that the notice to employees that is referred to in paragraph 42 of the stipulation (advising employees that they would not be disciplined for engaging in the picketing and handbilling) was posted from October 22 until December 28 (when he removed all other notices from Respondent's bulletin board, as well). Finally, Green testified that he has restated the message of the notice to employees during several staff meetings that he has conducted.

9 As Green described the event: "Basically, we had a grill out there and we had a few tables for condiments, papers plates and people would walk through the line. They would be served. We had one person out there taking cash and a couple [of] tent awnings right out in front of the store."

Credibility Resolutions

Green was credible in his testimony that the only breakfast service that Respondent ever permitted on the sidewalk was the one that it conducted at its grand opening in August 1996. Hackmann, however, was credible in her testimony that in October 1996, Marketing Director Brady permitted high school girls to solicit for a charitable purpose outside the store for one and one-half hours. Hackmann was further credible in her testimony that in September 1997, representatives of a local radio station were allowed to stand on the sidewalk for one and one-half hours to engage in a promotion of that (noncharitable) business, which promotion included distributions of free movie tickets. Moreover, Parker and Guise were credible in their testimonies that in December 1996 Ordnoff permitted them to circulate the animal-rights petitions outside the store as well as inside. Parker and Guise had each had a more favorable demeanor than Ordnoff, and Parker was credibly corroborated by Dougherty in at least part of her testimony. Moreover, Ordnoff rendered herself unimpressive on another account. Ordnoff first testified to the existence of only one petition; she testified that she circulated it after telling the young man that he needed the general managers permission to engage in such a solicitation himself; then, in an obvious attempt to explain the other copies of the petition, Ordnoff returned to the stand to state that, after all, the other two people who were with the young man circulated petitions, in her presence, even without the general managers permission. Ordnoff was not credible.

Conclusions

Respondent contends that, even if it did cause the Ladue police to attempt to have the picketing union representatives removed from in front of Respondent's store, its action cannot be held to be a violation of Section 8(a)(1) because it could not be considered "discriminatory," as paragraph 5 of the complaint alleges. Citing various cases, Respondent argues that its action could not be considered to be discriminatory because the only solicitations that it ever allowed were "isolated" instances of "beneficent acts." Assuming that proof of discrimination is necessary for the establishment of a violation in this case, the nonunion-concerned solicitations that Respondent did permit were hardly isolated, and they were not all "beneficent." There is no distinction in law between the indoor and the outdoor solicitations that Respondent permitted,[10] but the permitted outdoor solicitations alone prove that Respondent allowed more than "isolated" solicitations. In August 1996, Respondent, despite its lease obligation not to do so (stipulation, par. 24), opened its store with an outdoor solicitation, the breakfast service that it conducted on the sidewalk. Thereafter, it permitted the outdoor solicitations of the high school ticket sales, the Circus Flora event,[11] the Humane Society event, the radio-stations promotion, and the Blood Mobile solicitation. In addition to those outdoor events, Respondent permitted the Union representatives to solicit signatures outside, as well as inside, the store when they were circulating the animal-rights petitions. Additionally, Respondent did permit, or even sponsor, the monthly (i.e., regular) 5% Days for various charities that were conducted inside the store. Finally, Respondent sponsored or permitted the sweater sales and the radio station promotion, both of which were purely operations for profit. Therefore, the other solicitations that Respondent permitted, or sponsored, were neither "isolated" nor "beneficent."

More importantly, proof of discrimination is not necessary to establish a violation in this case. In cases of actual or attempted ejections of nonemployee solicitors, discrimination issues arise only in the context of actions by a respondent who has a property interest which would allow it to exclude all solicitations. In such cases, the Board first determines whether a respondent has such a property interest.[12] If the respondent does have such a

[10] See, for example, *Schears Food Center*, 318 NLRB 261 (1995), where discriminatory enforcement of no-solicitation rules against outdoor activities was proved by various indoor solicitations.

[11] The Circus Flora event also included an outside banner which was much larger than any picket sign that the Union ever utilized.

[12] See, for example, *Food for Less*, 318 NLRB 646, 649–650; enfd. 95 F.3d 733 (8th Cir. 1996), which holds that the considerations of *Lechemere, Inc.*, 502 U.S. 527 (1992), and *Babcock & Wilcox, Co.*, 351 U.S. 105 (1956), do not apply in cases where the respondent-employer does not have such a property interest.

property interest, the Board examines whether it has valid and applicable no-solicitation rules.[13] Only if the concerned respondent does have such a property interest, and only where it does have valid and applicable no-solicitation rules, will the Board examine whether such rules have been applied discriminatorily. In this case, however, the picketing and handbilling were conducted in the common areas of the property where Respondent has only "an appurtenant easement." (Stipulation, par. 20.) Because of the limited nature of its leasehold interest, Respondent has no property right that would allow it to establish valid no-solicitation or no-distribution rules under the aegis of which it could lawfully seek to interfere with the picketing and handbilling activities that the Union has conducted (and is conducting) in this case.[14] Moreover, Respondent stipulated that it does not maintain either a no-solicitation or no-distribution policy. (stipulation, par. 23.) In summary, regardless of whether Respondent has acted discriminatorily, it had no right to seek to exclude the soliciting nonemployees because it had an insufficient property interest to do so; and even if it had had such interest, it did not have valid and applicable no-solicitation rules pursuant to which it could lawfully have sought to exclude the Union from the common areas of the Lammert Center.

The issue therefore becomes whether Respondent's stipulated act of reporting the picketing and handbilling to the property owner constituted interference within the meaning of Section 7 and Section 8(a)(1). I conclude that it did.

Respondent first argues that its report to the property owner is protected free speech under the first amendment to the Constitution. In *Hudgens v. NLRB*, 424 U.S. 507 (1976), however, the Supreme Court rejected such an attempted application of constitutional free speech principles to disputes regarding nonemployee access to "quasi-public" private property. Respondent further argues that Section 8(c) of the Act insulates its conduct from challenge. Section 8(c) provides:

> The expressing of any views, argument or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under the provision of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

In this case, however, even if one assumes that Respondent's contacting the property owner could be considered something of an expression of "views, argument or opinion," it was also a great deal more. Respondent's contacting the property owner about the picketing and handbilling was an implied (if not express) request for the property owner to do something. That something, inelu ctably, was a call to the police in an attempt to get the Union's lawful picketing and handbilling activities stopped.

To preclude any possibility that Marcher could have missed the object of Respondent's contact, Respondent's attorney accompanied Marcher as he made his request to the police; Respondent offers no other explanation for Rick's presence during Lt. Baldwin's on-site investigation. Even without Rick's accompaniment, however, Marcher assuredly knew when he was called by Respondent's agent that Respondent had never before complained about other solicitations that had been conducted in the common areas of the property. Marcher would also have known that in its lease Respondent had assumed no obligation to notify the property owner of such solicitations. That is, Marcher knew that Respondent was not engaging in an academic exercise when its agent contacted him 'to report the presence of the picketers and to inquire about the owner's policy about such picketing activities on the property owner's parking lot." (Stipulation, par. 35.) Ineluctably, again, Marcher knew what Respondent wanted him to do, and Marcher did it.

Calling the police in an effort to stop otherwise lawful picketing and handbilling was something that Respondent could not have lawfully done itself. *Great Scot, Inc.*, 309 NLRB 548 (1992). Respondent's attempt to interfere with the employees' Section 7 rights by indirection was no more lawful than if it had made the request to the police itself. I therefore find and conclude that on October 16, 1997, Respondent violated Section 8(a)(1) of the Act by informing the owner of the Lammert Center about the Union's lawful picketing and handbilling activities where an object of so informing the owner was to interfere with such activities.

Finally, Respondent argues that no order can be issued against it because of the stipulated notices that it has posted to the employees and because of the assurances to the employees that Green has orally given. Those notices and assurances, however, stated no more than that employees could themselves assert their Section 7 rights. They did not promise, in any way, that Respondent would not continue to interfere with the rights of employees by interfering with the protected conduct of nonemployee Union agents such as those involved in this case.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[15]

ORDER

The Respondent, Wild Oats Markets, Inc. d/b/a Wild Oats Community Markets, Ladue, Missouri, its officers, agents, successors, and assigns, shall

1. Cease and desist from

[13] See, for example, *Price Chopper*, 325 NLRB 186 (1997), where the respondent had valid no-solicitation rules, but none applied to the physical area where the nonemployee activity was conducted.

[14] See *Food for Less*, supra, which discusses such leases, specifically under Missouri law.

[15] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Informing the owner of the Lammert Center about any lawful picketing or handbilling activities by the Union where an object of so informing the owner is to interfere with such activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its facility in Ladue, Missouri, copies of the attached notice marked "Appendix."[16] Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 16, 1997.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification by a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington D.C. June 22, 1998

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT inform the owner of the Lammert Center about any lawful picketing or handbilling activities by United Food and Commercial Workers Union, Local 655, AFL–CIO, CLC, where an object of so informing the owner is to interfere with such activities.

WE WILL NOT in any like or related manner interfere with, restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WILD OATS MARKETS, INC. D/B/A WILD OATS COMMUNITY MARKETS

[16] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."